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No. 83-956

In the Supreme Court of the United States

OCTOBER TERM, 1983

FRED S. BERRYMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's airport encounter with agents of the Drug Enforcement Administration was an illegal seizure of his person that tainted the ensuing consent search of his suitcase.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1-4) is reported at 717 F.2d 650. The opinion of the panel of the court of appeals (Pet. App. 6-67) is reported at 717 F.2d 651.[1]

[1] The majority of the court sitting en banc adopted the dissent to the panel opinion as its own opinion and added certain observations (Pet. App. 2-3). Similarly, Judge Bownes' dissent from the en banc court's decision simply adopts the majority opinion of the panel (Pet. App. 4).

JURISDICTION

The judgment of the en banc court of appeals was entered on October 11, 1983. The petition for a writ of certiorari was filed on December 9, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted on one count of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to four years' imprisonment and a special parole term of three years.

1. The evidence adduced at trial showed that on September 8, 1981, petitioner flew from Fort Lauderdale to Boston's Logan Airport.[2] Upon arrival at Logan Airport, petitioner walked rapidly to the luggage area, glancing once over his shoulder (Pet. App. 9). Petitioner then stood five or ten feet back from the baggage carousel, despite the fact that the area near the carousel was not particularly crowded (Tr. 31). Petitioner scanned the area and, after waiting for most of the other passengers to recover their luggage (Tr. 199), picked up a single suitcase, looked around the area once more (Tr. 7), and left the terminal.

Drug Enforcement Administration agents Lemon and Fencer approached petitioner just outside the terminal, identified themselves as DEA agents, and asked if they could speak with him. Petitioner said he did not mind (Tr. 7-8, 72, 162). In response to

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[2] The evidence is summarized in the majority opinion of the panel, at Pet. App. 8-13.

a question, petitioner told the agents that he had arrived from Fort Lauderdale (Tr. 9, 72). Lemon asked to see petitioner's ticket and some identification, which petitioner handed over voluntarily (Tr. 9, 39, 72). The ticket was a one-way ticket purchased with cash (Tr. 10). When asked why and how long he had been in Fort Lauderdale, petitioner said he had been there for three days on business concerning the purchase of land in Alaska (Tr. 9, 43, 164, 165).

The agents then asked petitioner whether they could search his suitcase (Tr. 11, 44, 74, 166).[3] Petitioner consented and, while still in a public area, unlocked the valise himself (Tr. 11, 127, 166). The suitcase contained a gift-wrapped package, which petitioner said he was delivering for someone he had met in Florida, and probably—although he was not certain—contained a toy (Tr. 13, 46, 75, 167). The package, however, was not solid, but had "a soft mushy-type feeling with chunks" (Tr. 13, 167). Noting that the package did not feel like a toy, Lemon asked petitioner if he minded if the package were x-rayed. Petitioner said he did not mind (Tr. 14, 75, 169). Since the x-ray machine was located in a public area of the terminal upstairs from where petitioner and the agents stood, Lemon said to petitioner, "I'm going to go up and you can come with me if you want to." (Tr. 15). Petitioner accompanied the agents upstairs. The x-ray examination of the package revealed no solid objects (Tr. 15, 47, 76, 170). Lemon asked if he could open the package,

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[3] Both agents testified that petitioner was expressly told that he could refuse to consent to the search (Tr. 11, 44, 74). The district court credited the agents' testimony (Tr. 135, 137; Pet. App. 11, 76).

and petitioner said he did not mind (Tr. 16, 53, 171). The agents and petitioner returned downstairs to the baggage claim area. Lemon carried the package into a small airline office, while petitioner and Fencer remained outside (Tr. 17, 77, 171). The package contained approximately a pound and a half of high quality cocaine (Tr. 17, 18, 171, 172).

Agent Lemon then left the office and showed petitioner the packets of cocaine he had discovered. Lemon advised petitioner that he was not under arrest, but gave him *Miranda* warnings and asked petitioner to accompany him and Agent Fencer to the DEA office in the airport while they contacted the United States Attorney's Office. Tr. 20, 79, 173. After speaking to the federal prosecutor, Lemon told petitioner that he would not be arrested at that time, but might be arrested in the future (Tr. 21). From beginning to end the episode lasted about 45 minutes (Tr. 22).

2.a. On October 15, 1981, the grand jury returned an indictment charging petitioner with the drug possession offense upon which he was convicted. Prior to trial, petitioner moved to suppress the cocaine discovered in his suitcase, alleging that it had been seized in violation of his Fourth Amendment rights. Crediting the agents' testimony,[4] the district court

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[4] The district court erroneously stated (Pet. App. 73) that the agents had expressly informed petitioner that he was free to leave during the initial phase of the encounter. There was no testimony to that effect. All members of the court of appeals recognized that this statement was erroneous. See Pet. App. 19 (panel majority); Pet. App. 59 (Breyer, J., dissenting). Because the majority of the en banc court expressly adopted Judge Breyer's dissent from the panel's ruling as its own (Pet. App. 2), petitioner's claim (Pet. 16 n.2, 21-23) that the en banc court of appeals ignored the district court's

denied the motion to suppress, determining that the entire encounter between the agents and petitioner was a consensual, non-seizure contact such as Justice Stewart described in *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.), and that petitioner had voluntarily consented to the search of his suitcase (Tr. 68-78).

b. A divided panel of the court of appeals reversed petitioner's conviction (Pet. App. 6-45). The panel majority concluded that petitioner was seized within the meaning of the Fourth Amendment when first approached by Agents Lemon and Fencer, because petitioner was not told he was free to leave and because two agents were present and "surrounded" him (Pet. App. 20-21). In the alternative, the panel majority concluded that petitioner had been seized at some later juncture, no later than the time the agents asked if they could x-ray the package (Pet. App. 24-25). The majority also concluded that reasonable suspicion sufficient to justify the seizure—which it characterized as a "limited intrusion"—was lacking both at the outset of the encounter and as it unfolded (Pet. App. 15-17, 28-30, 44-45). Judge Breyer dissented (Pet. App. 46-67). Reasoning that "if officers ask for and receive permission to question a person, there is no 'seizure' within the meaning of the Fourth Amendment" (Pet. App. 51), Judge Breyer concluded that no seizure of petitioner's per-

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error is mistaken. We note that the district court may well have transposed the agents' testimony concerning their request for consent to search petitioner's suitcase, with their testimony about the initial approach to petitioner, for at the latter point, the agents testified, they did explicitly advise petitioner of his right to decline to cooperate (see page 3 note 3, *supra*).

son had transpired at the time the agents found the package (Pet. App. 49-51) and that, in any event, that the consensual questioning that occurred here, if labeled a "seizure," was reasonable in light of the strong public interest in permitting police to undertake such questioning and the minimal intrusion upon petitioner's privacy interests (Pet. App. 52-56). Judge Breyer further determined that no seizure had occurred in the later phases of the encounter leading up to discovery of the cocaine (Pet. App. 61-62). In the alternative, he concluded that suspicion sufficient to justify detention of petitioner pending further investigation arose as the encounter proceeded. Petitioner's use of cash to purchase separate one-way tickets for a round trip itinerary concluded within a few days, coupled with his volunteered explanation that he had traveled to *Florida* to talk about an *Alaska* land deal, provided a predicate for going forward with a manual examination of the package (Pet. App. 62-63). And suspicion was heightened when the agents felt a lumpy powder in the package and when petitioner gave an improbable account of how he came to be in possession of the package (Pet. App. 64; see page 3, *supra*).

c. The government's suggestion for rehearing en banc was granted. The en banc court adopted Judge Breyer's dissent from the panel's ruling as its own (Pet. App. 2), adding that its decision "rest[ed] primarily upon our having found that [petitioner's] decisions to answer the DEA Agent's questions and to allow them to look through his bag were voluntary" (*ibid.*). Judge Bownes dissented, adhering to the panel majority opinion (Pet. App. 4).

ARGUMENT

Petitioner claims that his consent to the search of his suitcase was tainted by an investigative seizure of his person unsupported by the requisite reasonable suspicion. Petitioner's arguments largely ignore the court of appeals' determination, supported by the pertinent decisions of this Court, that his encounter with the DEA agents at Logan Airport was a non-seizure consensual encounter. No further review is warranted.

1. The encounter between petitioner and the two DEA agents at Logan Airport was not a seizure. It is settled that "not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968). In *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980) (citations omitted), Justice Stewart explained:

> [A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

As the court below recognized (Pet. App. 49-50), a majority of this Court has now endorsed Justice

Stewart's statement of the applicable law. See *Florida* v. *Royer*, No. 80-2146 (Mar. 23, 1983), slip op. 5-6, 10 (opinion of White, J.); *id.* at 2 (Blackmun, J., dissenting); *id.* at 5 n.3 (Rehnquist, J., dissenting).

Here, as in *Mendenhall*, none of the indicia of a Fourth Amendment seizure was present. Only two agents approached petitioner. They were dressed in suits. They stood on either side of petitioner without blocking his path. Neither agent displayed a weapon or touched petitioner or commanded him to stop or to do anything. Petitioner was explicitly asked if he would agree to talk to the agents and responded affirmatively (Pet. App. 58-59, see page 2, *supra*). The agent's approach was, as the district court found (Pet. App. 72), "proper, non offensive, direct, nonmenacing [and] cooperative." [5]

The encounter continued to be consensual in nature as it unfolded. Petitioner gave his consent to the search of his suitcase after being told that he could refuse to consent.[6] Petitioner again gave consent

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[5] Contrary to petitioner's contention (Pet. 15), the questioning was not prolonged; the agents asked routine questions concerning itinerary and ticketing typically approved by courts in cases involving airport encounters. See, *e.g.*, *United States* v. *Regan*, 687 F.2d 531 (1st Cir. 1982); *United States* v. *Jodoin*, 672 F.2d 232 (1st Cir. 1982); *United States* v. *Smith*, 649 F.2d 305 (5th Cir. 1981), cert. denied, No. 81-5181 (Apr. 4, 1983). Moreover, contrary to petitioner's assertion (Pet. 15-16), the agents did not accuse petitioner of transporting narcotics, but merely responded to petitioner's inquiry as to "what was the matter," by remarking that the level of drug traffic between Fort Lauderdale and Boston was high (see Pet. App. 11).

[6] See page 3 note 3, *supra*. The district court credited the agent's testimony where it conflicted with petitioner's in this regard. Thus petitioner's account of the facts (Pet. 7)

when asked if he minded having the package x-rayed, elected to accompany the agents to the x-ray machine when offered the choice not to do so, and agreed to opening the package after the x-ray revealed no solid objects. Moreover, the agents did not retain petitioner's ticket and driver's license during these events (Pet. App. 66), and during the entire course of events petitioner remained within the public area of the airport. Petitioner also retained custody of his suitcase (except for the suspicious package) at all times.

As the en banc court recognized (Pet. App. 64-67), a comparison of this case with *Florida* v. *Royer*, on which petitioner now relies, affirmatively demonstrates the lawfulness of the encounter in this case. Unlike Royer, petitioner was never accused of transporting narcotics (see page 8 note 5, *supra*), was given back his ticket and identification, was never separated from his luggage, was not asked to proceed to a police station or any area closed to the public at large until the cocaine was actually found, and expressly consented to the search of his luggage and each ensuing step, while in the public area of the airport. Compare *Florida* v. *Royer*, slip op. 10 (opinion of White, J.). Petitioner's reliance on *Royer* is accordingly misplaced.[7]

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relies upon testimony found to be untrue. We note, as well, that petitioner's testimony as to whether he was told that he could withhold consent is internally inconsistent. He ultimately conceded that he had been so advised but asserted that "[i]t was a kind of double-talk" (Tr. 108).

[7] Petitioner also invokes (Pet. 11-12, 23-24) *United States* v. *Place*, No. 81-1617 (June 20, 1983). But petitioner never argued in the courts below that his luggage was detained for an impermissible time, and he accordingly may not do so here. In any event, the teaching of *Place* regarding the permissible duration of an investigative detention of luggage has no rele-

2. "When the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause." *United States* v. *Place*, No. 81-1617 (June 20, 1983) slip op. 7; see also *Florida* v. *Royer*, slip op. 6-7 (opinion of White, J.); *Reid* v. *Georgia*, 448 U.S. 438, 440 (1980). Accordingly, even if petitioner were deemed to have been "seized" at some point subsequent to the initial approach of the agents, there were, for the reasons well stated by Judge Breyer (see page 6, *supra*), sufficient articulable facts to justify his detention during the consent search of his suitcase, the x-ray examination of the package, and the opening of the gift-wraped package.

Contrary to petitioner's contention (Pet. 17-20), the basis for suspicion here was considerably more substantial than that held inadequate in *Reid* v. *Georgia*, *supra*. The basis for suspicion identified in *Reid* was limited to the following indicia: (1) Reid arrived from Fort Lauderdale, a source city for cocaine; (2) Reid arrived in the early morning, when law enforcement activity is diminished; (3) Reid and his companion appeared to be trying to conceal the fact that they were together; and (4) they apparently had no luggage other than their shoulder bags. 448 U.S. at 440-441. Here, of course, the agents knew, after the initial consensual questioning, that petitioner had claimed to have traveled to Florida to investigate an Alaska land deal, and had purchased two separate one-way tickets in cash for a round trip itinerary.

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vance here, for, to the limited extent petitioner's belongings were held by law enforcement officials, that action was based on consent.

And when they opened petitioner's suitcase and saw a gift-wrapped package, the agents were given an explanation of its provenance that can only be considered suspicion-provoking.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] Petitioner asserts that his conduct was "completely consistent with perfectly innocent behavior" (Pet. 13). But because probable cause "merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief' * * * that certain items may be contraband * * * [without] demand[ing] any showing that such a belief be correct or more likely true than false" (*Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983), slip op. 11 (opinion of Rehnquist, J.) (citation omitted); see also *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), slip op. 20, 23), the lesser standard of reasonable suspicion, upon which minimally intrusive seizures may be carried out, necessarily will be satisfied in many instances where the conduct observed ultimately turns out to be innocent. Petitioner apparently would insist that no law enforcement action may be taken upon evidence providing less than virtual certainty of wrongdoing. Compare *Texas* v. *Brown*, *supra*.

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